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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 705

B. I. SALINGER, JR., APPELLANT,

vs.

VICTOR LOISEL, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF LOUISIANA, *et al.*,

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CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

BRIEF FOR APPELLANT.

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ST. CLAIR ADAMS,
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On Brief.

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STATUS.

This is *certiorari* to the Circuit Court of Appeals in the Fifth Circuit. There is presented in it every point raised on the argument in No. 341 and No. 342. The additional matters discussed in it are:

1. Did said Court of Appeals have jurisdiction?
2. Was the decision of the New York courts an adjudication against appellant?
3. Does any waiver or estoppel bar defendant to resist removal on the ground that he has executed appearance bonds?

Statement of Case Peculiar to 705.

The District Court had before it whether appellant ought to be removed to the District of South Dakota, upon the indictment returned in that district and upon such further evidence as was adduced before that court. It held there might be removal and accordingly dismissed the two writs of habeas corpus. It allowed appeals to this court and ordered that the appeals should operate as a supersedeas pending decision in this court, and it required certain bonds including one "in the nature of a supersedeas appeal bond,"—and these were given as ordered.

The Circuit Court of Appeals allowed appeal and assumed jurisdiction:

(1) To decide whether the District Court erred in ordering removal after said appeals to this court had been perfected.

(2) It took jurisdiction to decide the very questions which the perfecting of said appeals had transferred to this court.

It did not have power to pass on the question whether the District Court erred in ordering removal after the perfecting of said appeals; this, because interference with the supersedeas was also a question for this court alone.

All further statement necessary is in the argument in No. 341 and No. 342.

ADDITIONAL SPECIFICATIONS OF ERROR.

I.

The Circuit Court of Appeals of the Fifth Circuit had no jurisdiction of the subject matter because that subject matter was at the time, when said Court of Appeals assumed jurisdiction, in the Supreme Court of the United States, and no other court could deal with it, while it was thus pending in the Supreme Court.

II.

The Circuit Court of Appeals erred in holding, if it did so hold, that the decision of the New York courts was an adjudication against this appellant.

III.

It erred in holding (if it did so hold) that any waiver or estoppel was a bar to resisting removal on the part of this appellant.

Division I.

THE CIRCUIT COURT OF APPEALS FOR THE CIRCUIT HAD NO POWER TO DO ANYTHING BECAUSE IT HAD NO JURISDICTION OF THE SUBJECT MATTER.

As above shown, said Court of Appeals assumed jurisdiction when the Supreme Court of the United States had already assumed and still had it. We submit that all said Circuit Court of Appeals could effectually do was to dismiss the appeal. It needs no brief for the proposition that federal courts must, if it be not done by the litigant, raise the question of their own jurisdiction *sua sponte*.

The text in 15 Corpus Juris, pp. 1134-1136, declares:

"Where two actions between the same parties on the same subject and to test the same rights are brought in different courts having concurrent jurisdiction, the court which first acquires jurisdiction, its power being adequate to the administration of complete jurisdiction, retains its jurisdiction and may dispose of the whole controversy and no court of coordinate power is at liberty to interfere with its action. This rule rests upon comity and the necessity of avoiding conflict in the execution of judgments by the courts and is a necessary one, because any other rule would unavoidably lead to perpetual collision and be productive of most calamitous results."

Again, at page 1138:

"With respect to appeals it has been held that where an appeal may be taken to different courts and several parties are each entitled to appeal, the one first perfecting an appeal to one of such courts thereby carries the entire case to that court. But it has also been held that where concurrent appeals are taken to the court of last resort and to a lower appellate court the latter will dismiss its appeal to it when the former takes jurisdiction. It is also necesssary that the court first obtaining jurisdiction should be in a position to determine the whole controversy and to settle all the rights of the parties, and if by reason of the limited jurisdiction or mode of proceedings of that court these results cannot be accomplished, another court may take jurisdiction."

In Taintor's case, 16 Wall. 367, it is said:

"When a state court and a court of the United States may each take jurisdiction, (as in this case), the tribunal which first gets it, holds it to the exclusion of the other until its duty is fully performed and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases. It is indeed a principle of universal jurisprudence that, when jurisdiction has attached to a person or thing, it is—unless there some provision to the contrary—exclusive in effect until it has wrought its function."

Illustrative of the basic foundation of this point is the

Peckham case, 125 Fed. at 990, cited in the Stallings case. The Peckham case declares:

"If it was the duty of the marshal to arrest him under the second warrant it would be his duty to carry out the decision on the second warrant as it is his duty to carry out the decision on the first warrant. If the two proceedings resulted in an order for the removal of the defendant in the one case to the eastern district for trial, and in the other case to the District of Columbia for trial, it is obvious that no such orders could be complied with at the same time. The only possible ruling is that a court which has in custody a person charged with a crime, has exclusive custody and jurisdiction until the question of his guilt or innocence is determined, and if he is found guilty, until the period of imprisonment has expired."

In the case of James, 18 Fed. 857, there is quoted with approval the following statement of Judge Dillon made in *U. S.* v. *Van Fossen*, 1st Dill. 411:

"If a person is in the actual custody of the United States for the violation of its laws, no state can, by habeas corpus or any other process, take such person from the custody of the federal tribunal or officer. So, on the other hand, a person in custody, under the process or authority of a state, is by express enactment beyond the reach of the federal courts or judges (citing the judiciary act)."

We submit that both upon reason and authority all power possessed by the Circuit Court of Appeals was to order the dismissal of the appeal to it.

Division II.

The Circuit Court of Appeals erred in sustaining the District Court in proceeding to execute order of removal while appeal testing the right to remove was pending on appeal to the Supreme Court—if it be assumed the Circuit Court of Appeals had jurisdiction.

This appellant resisted removal from Louisiana to South Dakota, mainly on the ground that the indictment upon which removal was sought was void for stated reasons. His contention having been overruled by the United States District Court for the Eastern District of Louisiana, he perfected appeal to the Supreme Court of the United States. With this he gave bonds as directed; and this made effective the order which allowed said appeal to the Supreme Court to operate as a *supersedeas*. And he should have been thereupon enlarged under said bonds.

It appears that despite said pendency of said appeals, and the existence of said *supersedeas*, a warrant of removal issued by the judge of said District Court was by him ordered to be executed, and bail denied. The Circuit Court of Appeals allowed appeal, superseded, and allowed bail. But it sustains the District Court in attempting to execute the removal despite pendency of appeal in this court. If that be not error, the appeal to this court was idle. How can it effectively pass on whether there ought to be a removal, if one be executed before it reaches decision of the appeal. To what end the order of *supersedeas* and the *supersedeas* bail bond. When attempt to remove was made this court had whether appellant ought to be removed. While appeal was pending in the Supreme Court, and during the subsistence of

said *supersedeas*, the District Court had no power or jurisdiction to order appellant in custody—or to remove him, because the effect of the *supersedeas* was to permit him to be free from custody, and that he should not be removed, pending decision of his appeal to the Supreme Court.

It would seem to be self-evident that this position is sound. The basis of it is that when a question is pending in an Appellate Court no one may disturb the *status*, and thus bring about that the decision of the Appellate Court will be purely moot. The question in Washington was and is whether a removal was permitted where the basis of it was a certain indictment. The effect of the *supersedeas* was that the appellant should not be in custody nor be removed pending decision of this question by the Supreme Court of the United States. If a United States District Court can while this appeal is pending, and while that *supersedeas* remains effective, order a removal or a detention pending decision of the appeal in the Supreme Court, then though by the *supersedeas* of the Supreme Court the appellant is enlarged, the District Court can order him into custody or give him the alternative of being at once removed. If this is permitted the jurisdiction of the Supreme Court depends on the sufferance of the lower court. That court can accomplish that when this court enters upon whether there should be a removal, that question has become moot.

Again—look at it from the standpoint of appellant. He asks the Supreme Court to decide whether he ought to be removed at all on the strength of a certain indictment. He gives bond that he will abide the judgment of the Supreme Court. He takes the steps that entitle him on an order of that court to remain at large pending de-

cision. If while that remains the situation a District Court can order him into custody or remove him, the same order may be made by any number of District Courts if by chance the appellant be found at different times in different districts. He can be overborn by the number of new bonds that might be demanded although he has already given the bonds that obtained *supersedeas* in the Supreme Court of the United States. He may be ordered into custody any number of times although the *supersedeas* says that he may remain at large. And finally, after being put to the burden of perfecting and possibly making argument on his appeal in Washington, be removed and have nothing remaining but the poor satisfaction that if the Supreme Court should decide his case at all, it might find he ought not to have been removed.

Division III.

It is the settled law that successive applications for writ of habeas corpus may be made, and that so long as there is a remand successive applications cannot be met by the claim that the decision on a former application is an adjudication against applying again.

The opinion declares that the contentions now made were unsuccessfully made in New York, in both the District Court of the United States and in the Circuit Court of Appeals, for the Second Circuit, and it says: "We do not think it would be seemly or proper for this court also to pass upon the same contentions,"—and that what is now being done, "is but an attempt to substitute the writ of habeas corpus for a writ of error." It may be that this is not a holding that the said proceedings in New York work an adjudication. At any rate, it is all

that *is* said upon which the respondent could assert adjudication.

First of all, let it be said that while the record does set forth the proceedings that were had in New York (342, pp. 46, 47, 49-60, 65-75) there is not one word that even intimates that a plea of former adjudication is being interposed. (342, pp. 6-9, 63, 64) It is, of course, elementary that adjudication is not for decision unless specially pleaded. That this is the general rule will not be denied. *Williams,* 265 Ill. 64; *Hutson* (Ill.) 123 N. E. 526; *Mayhood,* 4 Alaska, 226; *Salen,* 244 Federal, 299; *Graff,* 226 Federal, 798; Daniel, Chancery Pleading & Practice (6th Am. Ed.) *855; *Pioneer Company,* 110 N. C. 176.

It should be pleaded specially. *Maybury* (C. C. A.) 60 Federal, 645; Bigelow, Estoppel (5th Ed.) 455; *Wood,* 29 Ind. 179; *Robbins,* 76 Ind. 390; *Cole,* 84 Ind. 448; *Stewart,* 90 Ind. 458; *Thomas* (La.) 35 Southern 811; *Hinton* (La.) 50 Southern, 798; *In re Youtsey,* 260 Federal, 423. It is said in *Railway* v. *Howard,* 13 How. 335, 336, that the rules on this subject are well settled, to wit, the rules that require estoppels to be specifically pleaded and thus pleaded "with great particularity and precision, leaving nothing to intendment." Bliss, Code Pleading, 3rd Ed. 364, declares that such plea must be affirmative and specific. To like effect is *Mayhood,* 4 Alaska, at 229, 230; *Hinton* (La.) 50 Southern, 799; *Coffinger,* 210 Norton, 2 I. R. 241; *Onward,* 20 Smithson. The grounds of estoppel relied on must be set forth and pleaded as an estoppel. *Bonnecaze* (La.), 26 Southern, 833; *Hilton* (Ky.), 78 S. W. 890.

There must be special plea and it must set forth facts which indicate that an estoppel is being urged. *Smith* (S. D.), 126 N. W. at 594.

Where defendant does not plead estoppel either in the

original answer or amendment thereto as a defense to the action, he cannot avail himself thereof, though the evidence establishes this defense. *McQueen* (S. D.), 107 N. W. 208.

The court will not notice grounds of estoppel not especially pleaded. *Adkins* (La.), 55 So. 746.

This was held in a case which was reversed because recovery below was based on estoppel and though the evidence to prove an estoppel was not objected to by plaintiff.

This rule has been applied to *habeas corpus* proceedings. For, in the case of Hill (Colo.) 190 Pac. 425, it is said that those who seek to rely upon *res judicata* should have framed an issue on the matter of *res judicata,* in the proper way, and that merely directing the attention of the court to the *habeas corpus* proceeding is insufficient.

Indeed, the rule requiring pleading and the reasoning that underlies it settle that it is not enough to set out matters upon which an estoppel *might* be based, but that it must be made to appear the facts set out are relied upon as working an estoppel. This is so because such an estoppel is drastic, in that, "it gives the right to shut out the truth." Wherefore, it should appear affirmatively. Bliss, Code Pleading (3rd Ed.) 364; *Mayhood,* 4 Alaska at 229, 230. And to work an estoppel, declares Daniel, Chancery Pleading (8th Ed.) 34, it will not suffice where, say, fraud is relied on as constituting an estoppel, to pick out from the allegations in the pleadings facts which might, if put forward as proof of fraud, have warranted plaintiff in asking and the court in granting the relief involved—estoppel. Special defenses *can* be waived. *Mack,* 60 Fed. 753.

In the case of *Koppel,* 148 Federal, 505, the court calls attention to the fact that *res judicata* was raised in the

return (506), and then holds that the plea is not tenable. The statutes of the United States contemplate that there shall be pleadings in *habeas corpus* proceedings. (Sections, 754, 757, 760, R. S.) In *Ex Parte Stevenson* (Okla.) 94 Pac. 107, another *habeas corpus* case, it is stressed that, "in the record before us it would seem that the question of former adjudication was not raised (below) but that the case was there presented upon the evidence."

In the case of *Salen*, 244 Fed. at 299, the facts upon which an adjudication could be claimed were fully in the record, but the court said:

"I should dismiss the complaint on the defendant's motion if *res adjudicata* was pleaded as a defense, but since it is not pleaded and since the action is one at law, I am constrained to say that I am without power to dismiss."

In the case of Scott (Conn.) 35 Atl. 262, a *habeas corpus* proceeding, it is said: that "when pleadings are allowed the rules which govern pleadings, so far as they are applicable must be observed. This rule has been applied in the case of *Cox*, 15 App. Cas. at 516. No evidence which is not covered by proper plea may be considered in a *habeas corpus* proceeding. (*Ex Parte Avakian*, 188 Federal, at 689, Point 4.) And see the case of *Backus* (C. C. A.) 223 Federal, 487.

Passing all this, there is no adjudication because even if we waived that the parties are not identical it remains the fact that the issues are not. In the New York courts the conclusion of the indictment that the offense was committed in South Dakota was not met by any testimony. In the District Court of Louisiana those conclusions were met by the testimony of each of the three defendants that at no material time were they in the district of South Dakota. (342-42, 43) Their testimony was not impeached; and nothing disputed it, except the

said conclusion in the indictment. And as shown elsewhere such testimony overcomes such conclusion, as matter of law.

The general rule is that there is an adjudication "unless it is alleged and shown by complainant that the issues are not the same."

Sanitary Co. 226 Fed. at 797.

It is said in the *Clarke* case (Mo.) 106 S. W. at 996, 997, that

"From these cases may be deduced the doctrine that the principle of *res adjudicata* does not apply in cases of *habeas corpus* to judgments remanding the prisoner or to judgments discharging the prisoner where a new state of facts warranting his restraint is shown to exist different from that which existed at the time the first judgment was rendered."

Part 3-1.

A REMAND IN HABEAS CORPUS IS NOT AN ADJUDICATION, BECAUSE IT IS NOT MORE THAN THE ACTION OF A COMMITTING MAGISTRATE.

"And indeed all cases of commitment on a criminal charge the duty of the court or judge thereof upon such hearing is similar to that of the magistrate upon a preliminary examination; and though the prisoner may be discharged he may again be arrested for the offense upon a sufficient showing.

While the decision of the court or judge may liberate the prisoner from imprisonment it does not determine his innocence. He may be charged, tried and convicted without regard to his discharge upon the writ of *habeas corpus*. Upon such a hearing the guilt of the prisoner of the crime charged or of the right to rearrest him in consequence of it, cannot be finally determined. The order of his discharge simply releases him from the particular restraint to which he is subjected. Such a decision cannot convict him or acquit him of the crime charged." *Clarke* (Mo.), 106 S. W. at 996.

Ex Parte Johnson (Okla.) 98 Pac. at 465.

"If anything is wanting to remove all doubt, it will be found in the nature and object of this great writ as a constitutional right; its purpose being to afford a speedy remedy to a party unjustly accused of the commission of a crime without obstructing or delaying public justice, both of which objects would be defeated by the delays consequent upon an appeal. Any other rule would operate practically to subvert the constitutional safeguards and the fundamental rights of the citizens."

In *Howe* v. *State*, 9 Mo. 690, the reason assigned is that "The refusal to grant or discharge is not a final judgment."

In *Ex Parte Johnson* (Okla.) 98 Pac. at 464, the court approves the holding in the case of *Snyder*, 17 Kans. 552, construing an identical statutory provision, and holding that the statute did not apply because an order of commitment to hold a prisoner for trial issued by a magistrate before whom the person is brought for examination upon a charge of having committed an offense, and the finding that it appears the prisoner is guilty as charged in the complaint, is not "a process issued on any final judgment of a court of competent jurisdiction."

The most that can be made of a removal proceeding under Section 1014 is that it involves the functions of a committing magistrate. It is said in the *Pratt* case, 279 Fed. at 265, that the single question is whether there is an entire absence of evidence to show probable cause. For this it cites the *Henry* case, 8th Supreme Court, 123 U. S. 373. To settle such a question is, of course, nothing but the function of a committing magistrate.

No matter what court finally affirms, it is still dealing with nothing but the action of a committing magistrate—it needs no brief for the proposition that such action is never an adjudication, and this is why it is universally held that the points unsuccessfully urged against removal may be renewed in the trial court. In this connec-

tion it is not amiss to point out that an order of removal is reviewable on *habeas corpus*—a collateral attack. Can one conceive that there may be collateral attack upon what is in truth an adjudication.

Part 3-2.

PASSING THAT—THERE IS NO ADJUDICATION BECAUSE REMOVAL PROCEEDINGS DO NOT CONSTITUTE EITHER A CASE AT LAW OR A SUIT IN EQUITY.

They differ vitally from such a case or such a suit, because, for one thing, in the removal proceedings, a pleading drawn by the moving party, is admitted as evidence in his behalf. They differ still more radically from such a case or such a suit because in nearly every case where a *habeas corpus* application has resulted in a remand it was stated (and that is so of the opinion by the Circuit Court of Appeals in the 5th circuit) that the points made in resistance to removal were not foreclosed by an order of removal, and that the same points were available to the accused when he reached the trial court. It is difficult to understand how there can be an adjudication as to any point presented where it is the settled law that notwithstanding decision upon it, the same point may again be presented elsewhere. The one outstanding attribute of adjudication is that whatsoever it settles is settled for all places, for all courts and for all time.

Lord Halsbury, in *Cox* v. *Hakes*, 15 A. P. P. C. A. S. at 514, 515:

"It was not a proceeding in a suit but was a summary application by the person detained."

Cox v. *Hakes*, 15 A. P. P. C. A. S. at 514, 515.

In finding probable cause "his decision does not determine the question of guilt any more than his view

that the indictment is enough for the purpose of removal definitely determines its validity." *Tinsley's case,* 205 U. S. 20; 27 Sup. Ct. 433.

It is not final. *Blaffer* (C. C. A.), 160 Fed. 389.

Part 3-3.

IN VIEW OF THE FOREGOING IT IS NOT ASTONISHING THAT THE CASE LAW HOLDS WITHOUT BREAK THAT A REMAND IN HABEAS CORPUS NEVER WORKS AN ADJUDICATION.

In *Ex Parte Kaine,* 3 Blatchford C. C. page 3, Mr. Justice Nelson said:

"The learned counsel, appearing on behalf of the British authorities, has objected that the decision of Judge Betts, sitting in the Circuit Court, upon the return to the writ of *habeas corpus* before that court, it being a court of competent jurisdiction to hear and determine the question whether the commitment under the Commissioner's order or warrant was legal or not, is conclusive, and a bar to any subsequent inquiry into the same matters by virtue of this writ. I do not so understand the law. The learned counsel has referred to *Mercein* v. *The People* (25 Wend. 64), as an authority. The question in that case arose under the statute of the State of New York regulating the proceedings upon the writ of *habeas corpus;* and, if a decision there is as supposed, it would not be an authority to govern the case. * * * But, the conclusive answer to this objection is that the proceedings upon this writ in the Federal Courts are not governed by the laws and regulations of the states on the subject, but by the common law of England as it stood at the adoption of the Constitution, subject to such alterations as Congress may see fit to prescribe (*Ex parte Watkins,* 3 Peters, 193; *Ex parte Randolph,* 2 Brock C. C. R. 447); that, according to that system of laws, so guarded is it in favor of the liberty of the subject, the decision of one court or magistrate, upon the return to the writ, refusing to discharge the prisoner, is no bar to the issuing of a second or third or more writs, by any other court or magistrate having jurisdiction of the case; and that such court or magistrate may remand or discharge the prisoner in the exercise of an independent judgment upon

the matters (*Ex Parte Partington,* 13 M. & W. 679; *Canadian Prisoner's case,* 5 Idem 32, 47; *Suddis,* 1st East 306, 314; *Burdett,* 14 Idem 91; *Watson,* 9 Ad. and El. 731) in one of the cases referred to the prisoner had obtained this writ from two of the highest common law courts of England and also from the Chief Justice of the King's Bench at Chambers in succession and their judgments had been given upon a consideration of his imprisonment and the learned judge in delivering his opinion on the last application alluding to the decisions on the former writs, refusing to discharge, observed that this was no objection to the hearing on that occasion, as a subject in confinement had a right to call upon every court or magistrate in the kingdom, having jurisdiction of the matter, to inquire into the case of his being restrained of his liberty. The decision, therefore, of the Circuit Court, upon a previous writ of habeas corpus obtained on behalf of the prisoner, refusing to discharge him, will not relieve me from inquiry into the legality of the imprisonment under the order of the Commissioner, upon the present application."

In the *Partington* case, 13 M. & W. at 682, 683, it was said:

"The defendant, however, has a right to the opinion of every court as to the propriety of his imprisonment."

In Hilary Term, 8 Vict. 18, Messon and Wellsby's Report, 683, it is said:

"This case has already been before the Court of the Queen's bench on the return of a *habeas corpus* and before my Lord Chief Baron at Chambers on a similar application for a similar writ. In both instances the discharge was refused.

The defendant, however, has a right to the opinion of every court as to the impropriety of his imprisonment, and therefore we have thought it proper to examine attentively the provisions of the statute without considering ourselves as concluded by these decisions."

To like effect is *In re Bovack,* 2 B. C. at 223, 224.

In the matter of *Quinn,* 37 N. Y. S. 534, it was said (Cullen):

"In fact it is settled law that with the exceptions of a

narrow class of cases, such as the custody of infants, a decision on *habeas corpus* does not create an estoppel even upon the renewals of the writ."

Thaw v. *Lamb,* 118 N. Y. S. at 393.

Brinkley v. *Brinkley,* 56 N. Y. at 192.

The case is not within the principle of *Mercein* v. *People,* 25 Wend. 64, where the controversy related to the right to the custody of an infant child. In this case the relator is restrained of his liberty and a decision under one writ refusing to discharge him did not bar the issuing of a second writ by another court or officer.—Citing

Ex parte Kaine, 3 Blatchf.

Ex parte Partington, 13 M. & W. 679.

The King v. *Suddis,* 1 East, 806.

The previous so-called adjudication in proceedings in *habeas corpus* will not meet a new writ issued on the application of the relator.

People v. *Brady,* 56 N. Y. 192.

Denial of a prior writ of *habeas corpus* sought to enlarge a person acquitted of murder because of insanity on the ground that he was sane when the act was committed, was not *res adjudicata* because of the petitioner's plea of insanity on the subsequent hearing of a new writ for similar relief.

Thaw v. *Lamb,* 118 N. Y. S. at 390.

At common law, as has been seen, an order in *habeas corpus* proceedings remanding the prisoner to custody is not *res adjudicata.* The first adjudication at common law is not a bar to another inquiry upon the same state of facts. It is well settled that in the absence of restrictive statute a prisoner is entitled to exhaust the entire judicial authority of the state and federal courts having authority to act, in his efforts to free himself from unlawful imprisonment.—Citing *Carruth* v. *Taylor* (North Dakota), 77 N. W. at 620; Church Habeas Corpus, pp. 518, 519.

In re Snell, 31 Minn. 110, 16 N. W. 692, a well considered case, holds:

Under these authorities and the constitution of this

state, a person has the unassailable right, except when restricted by some statute, to apply to all courts for the liberty writ, which under the constitution has jurisdiction in *habeas corpus* cases.

Carruth v. *Taylor* (North Dakota), 77 N. W. at 620.

In the *Graves case* there is repeated the statement of Judge Nelson in *Ex parte Kaine* as to the proposition that the federal courts are not governed by state law, but follow the common law of England as it stood at the adoption of the Constitution.

In re Graves, 270 Fed. at 182-183.

"The doctrine of *res adjudicata* was not held appropriate to a decision of one court or justice therein; the entire judicial power of the country could thus be exhausted. (*Ex parte Kaine*) and cases there cited. The doctrine formerly prevailed in the several states of the Union, and in the absence of statutory provision, is the doctrine applicable now. In many instances great abuses have attended this privilege, which have led in some of the states to legislation on the subject."

Ex parte Cuddy, 40 Fed. 62, 63—per Justice Field.

In *Ex parte Clarke* (Mo.), 106 S. W. at 996, this is quoted approvingly from *Weir's case,* 99 Mo. 488, to wit:

"That the doctrine of *res adjudicata* is not applicable to the case of a refusal to discharge, and that the prisoner is entitled to the opinion of all the courts or officers authorized in a given cause to issue the writ as to the legality of his imprisonment, is conceded and is not limited in this state by statutory enactment, except in the one particular that the applicant for the writ in his petition must state 'that no application has been made or refused by any court, officer or officer superior to the one to whom the petition is presented.'

Subject to this limitation one restrained of his liberty may in succession apply to every court or officer authorized to issue the writ, notwithstanding another court or officer having jurisdiction may have refused to issue it or to discharge him from such restraint."

The refusal of that court to grant the writ of habeas corpus is no bar to an application here, even if the writ has been granted, and the case fully heard upon the return made to it, and a formal order made of record refusing a discharge from imprisonment, yet the writ now applied for might be granted by this court. Proceedings refusing the benefit of a habeas corpus will always be considered with deference and respect when application is made to another tribunal but they are not final. They do not stand as judgments and do not bar any more than the refusal of a supersedeas or an order for an injunction out of court.

Ex Parte Alexander, 2 American Law Register, at 46.

In the case of *Ammon*, 100 N. Y. S. 256, it was said:

"We shall assume without discussion that *habeas corpus* is the correct proceeding and that the relator has a right to bring as many such proceedings as he may be advised are necessary to protect his legal rights—he having brought several other prior like proceedings."

"Upon the general question involved in this proposition there is some difference of opinion among courts and text writers. But research and reflection have brought us to the conclusion that the sound rule and that supported by a great weight of long-standing authority is that the decision upon *habeas corpus* of one court or officer refusing to discharge, is not a bar to the issue of another writ upon the same state of facts as the first by another court or officer and to a hearing or discharge thereupon.—Citing *People* v. *Brady*, 56 N. Y. 192; *Ex parte Kaine*, supported by the pronouncement of Lord Kenyon at 1st East, 314; *Ex parte Partington; In re Snell* (Minn.), Sept. 19, 1883, 16 N. W. at 693.

In re Gaylor v. *Blair*, 4 Wis. at 532:

If a court or officer illegally imprisons a person and afterward upon application for his release refuses the application, the matters involved can no more be said to be *res adjudicata* than if no application for his release

had been made. In either case the person is imprisoned by order of the court or officer, and any number of adjudications by such court or officer as to the legality of the imprisonment cannot change its character nor affect the rights of the relator.

Ex parte Clarke (Mo.), 106 S. W. at 995, 996.

Plea of estoppel by record in a *habeas corpus* case is good on the same facts where the prisoner has been discharged and is bad where the prisoner has been remanded as here."

It is true that in *habeas corpus* proceedings the doctrine of *res adjudicata* at common law does not apply in so far as a refusal to discharge on one writ is no bar to the issuance of a new writ.—Citing *Parkington; Cox* v. *Hakes,* 15 Appeal Cases, 506.

Bradley v. *Beetle,* 153 Mass.

But it is equally true that discharge of a prisoner stands on a different footing.—Citing 21 Cyc. p. 349; *McCombgar case,* 167 Mass. 154; *Turgeon* v. *Bean* (Me.), 83 Atlantic, at 559. (Idem.)

"No mere legal fictions used in matters of less moment or matters of punctilio or comity between courts may shield anyone restraining an American citizen of his liberty from having the why and wherefore of that restraint summarily looked into by any court of competent jurisdiction in the land.

The discretion of one judge of remanding the prisoner does not bar the discretion of another in discharging the prisoner on *habeas corpus.* * * * He comes into court with his shackles dropped; and the cause of his imprisonment—the very marrow of it—is laid bare to the utmost verge and minutia permitted by written law. And this, too, no matter what court has theretofore denied relief, unless it be a court of superior jurisdiction."

Clarke (Mo.), 106 S. W. at 996.

"And while a judgment remanding the party on a writ of *habeas corpus* is not subject to review on writ of error or appeal, it is entitled to some consideration on a second application and may warrant the refusal of the second

application. In the case at bar and in all cases where the petitioner on application to a District Court or judge thereof, has been remanded, we are of the opinion that the constitutional right of the party to the writ was not exhausted by the first remanding order and petitioner has the right to present his application to this court as has been done in this case.

We believe any other construction of the statute would render it unconstitutional as unduly infringing upon the powers given to the courts to issue writs of *habeas corpus.*"

Ex parte Johnson (Okla.), 98 Pac. at 465, 466.

In the case of *Lawrence*, 56 N. Y. at 191, 192, there had been two prior writs of *habeas corpus* presented, in each of which the courts had dismissed the writ.

In the proceeding under the third writ, the return pleaded the two prior proceedings and the decisions therein as a bar. All matters affecting the merits existed prior to the first proceeding and determination. And the Court of Appeals (56 N. Y. 191, 192) said:

"We are of opinion that the previous adjudications in proceedings on *habeas corpus* are no answer to a new writ issued on the application of the relator. * * * In this case (unlike a controversy over the custody of an infant) the relator is restrained of his liberty; and a decision under one writ refusing to discharge him did not bar the issuing of a second writ by other court or officer."

Thaw v. *Lamb*, 118 N. Y. S. at 393.

A decision may be persuasive as an authority, but it is not *res judicata*. *Carter*, 105 Fed. 614, 616.

It is undeniable that some of the state decisions have proceeded, at least to some extent, on the ground that no appeal was allowed—that this was one reason at least why a decision resulting in a remand should not be an adjudication. The practice in said courts is, however, not followed in the federal courts. *Kaine*, 3

Blatchf. C. C. page 3; and in the *Carter* case, 105 Fed. at 614, in an opinion written by Justice Thayer and participated in by Justice Hook, the absence of the right of appeal could not have been controlling, because the very proceedings relied upon as an adjudication had been appealed to a Circuit Court of Appeals and presented to this court by *certiorari*. It is not amiss to add, however, that even if the absence of the right of appeal were a necessary foundation for the rule prevailing in federal courts, it is to be said that there is no right to appeal from an order of removal, as such.

The question of how far the practice of the courts of England followed in the federal courts is affected by the absence of the right to appeal, came squarely into the case of *In re Bowack*, 2 B. C. at 223, 224, decided March 20, 1892, and the court ruled that though statute had given the right of appeal, the giving the right was not a matter of exclusion, but an additional right, and that it left in force the ancient practice at the election of petitioner. The court said:

"Be this as it may, I shall assume that Mr. Bowack's right of appeal could, if he chose to assert it, be in some way legally preserved. Then comes the question—does the fact that the legislature has expressly given him that remedy impliedly operate as a bar to the proceedings before me? These proceedings undeniably involve the question of his personal liberty and as such have in the past been regarded as a part of the subject's constitutional rights, and therefore as rights of which he should not be deprived by mere implication; for 'the spirit of our free institutions requires that the interpretation of all statutes shall be favorable to personal liberty,'—per Lord Abinger in *Henderson's Case*, 2nd M. & W. 239, as cited in Maxwell. Hence I must hold that as the enactment giving the appeal has not expressly substituted it for the old practice, Mr. Bowack is entitled to the advantages which that practice gives him by seeking, as he now does, my opinion as to the legality of his arrest

and detention, regardless of the fact of his failure before another judge.

I might add that his application to me is in no sense an appeal from my Brother McCreith, but is one as to which I have to exercise a primary jurisdiction without knowledge of the materials before him and upon much more evidence as I am informed, than was presented to him."

Division IV.

Since it is the settled law that accused has the right to apply for successive writs it cannot be that the exercise of that lawful right can be nullified by naming that act an abuse of process.

The Circuit Court of Appeals for the Fifth Circuit says:

"We do not think it would be seeming or proper for this court also to pass upon the same contentions (made in the New York courts) * * * it is also, as it seems to us a palpable abuse of the writ of *habeas corpus.*" (Here follows argument on some facts disclosed in the record.)

In the case at bar there was but one successive application. If, as matter of law, that constitutes an abuse of the writ the rule that permits successive applications has no room to operate in. The rule could not have been builded unless some one had followed the first application at least by one other. If the fact of using the rule once defeats the second application, then there is no rule. It would be a permit to go swimming, with an injunction not to go near the water.

No statute prohibits the repetition of the application. On the contrary the settled law says that it may be made in turn to "every judge in the land." If the fact of a second application constitutes an abuse of process then there is the lawful right to make the application coupled with a construction that its very making shall defeat it.

The second application therefore cannot constitute such abuse; at least not as matter of law.

Passing that, and assuming that a single repetition can ever constitute abuse of process, whether it is that must depend upon the peculiar facts of each case. If it is to be determined as a fact question it must be specially pleaded because, of course, abuse of process is an affirmative defense—is an avoidance.

The case at bar exhibits no such plea, nor suggestion of one. But the Circuit Court of Appeals has seen fit to consider the alleged abuse of process as a fact question. The opinion points out that appellant gave a bond in Iowa to appear in South Dakota for trial, and that in New York,

"after he had unsuccessfully attempted to prevent his removal he voluntarily gave bond for his appearance for trial and instead of complying with his bond he again thwarted a trial by applying for further writs of *habeas corpus* outside of the jurisdiction of the trial court. The fact that the same surety which surrendered the petitioner in Louisiana, instead of delivering him up for trial in South Dakota, again bound itself by new bonds, is sufficient of itself to show that the resort to the court below was not really for the purpose of enabling the petitioner to secure his liberty but was designed to obtain, if possible, a ruling upon the validity of the indictment by the court below different from the rulings made in the Second Circuit, where the former application for *habeas corpus* was made, and in the Eighth Circuit in which the trial is sought to be held." (705-.....)

This argument is; (a) that repeating the application and in Louisiana courts constitutes an abuse of writ; (b) that noncompliance with a bond "voluntarily" given is an element in proving such abuse; (c) that the conduct of the surety proves the repetition in Louisiana was not in good faith; (d) and that abuse of process was also shown because the surrender by the surety was made in

Louisiana where appellant was found, instead of in the district of South Dakota.

We have said all we care to say for the proposition that repeating the application is a lawful act and is, therefore, not an abuse of process. To the statement of the court that this case is within the *Stallings case,* in that, the New York bond was given "voluntarily," it will be found in the return that the respondent himself declares that appellant "asked leave to give a bond conditioned for his appearance before the District Court of the District of South Dakota as in lieu and substitution for his removal by the marshal" (342-8) and the *Stallings* case, 253 U. S. 339, instead of being authority for holding that a bond given in these conditions was voluntarily given, makes it very clear that it is not, but is instead given under duress.

As to making surrender in Louisiana instead of South Dakota, the court in that district was in vacation when the surrender was made, and the surrender in Louisiana was not an abuse of process because it was the exercise of a right expressly given by statute. (See Sections 1014, 1018, 1019 R. S.)

As to the surety who surrendered later becoming the bondsman of appellant that, too, is no evidence of an abuse of process, for it is held in the case of *Grice,* 79 Fed, 627:

"Even if the writ is not authorized in behalf of a person at large on bail, yet if he surrender himself, or is surrendered by his sureties, and is in actual confinement, the writ may issue, and the court will not consider an objection that he was surrendered by collusion with his sureties."

It is further said (633):

"His sureties had an equal right to surrender him to the state, after it was given, for any cause whatever, and it is not within the province of the respondent to question

the purpose in either case. The court is of the opinion that he had the right to do either one or the other, for the purpose of testing the constitutionality of the law under a writ of *habeas corpus,* when all the facts of this case are considered."

Passing all that—and assuming that the Circuit Court of Appeals had the right to find what it did on the facts exhibited in the record, and there is furnished a conclusive argument why no such fact issue should have been considered where it was not raised on the record. Had that been done, appellant might have made proof that the repetition on his part was not captious. Surely, whether it is or is not captious must depend on the nature of the first decision. If that be clear and well considered, then though opposed to the desires of the petitioner, repeating the application might wear one aspect; if, on the other hand, the first decision bears strong indication that it is not such a decision as has just been described, repeating the application would bear a different aspect. Had abuse of process been pleaded, appellant might have shown that the surety who surrendered gave new bonds because additional indemnity had been given the surety. And made proof that the repeating of the application was not an abuse of process.

Fortunately, this record enables him to attempt a showing that he did not act captiously.

As said, it may be conceded for the sake of argument that a decision, though unfavorable to petitioner, was yet of such character as that it affords evidence of captiousness to apply again in the face of such a decision. The question of fact whether there are such decisions, remains. Extreme cases illustrate best. If some court would remand and order one to go to Dakota to be tried for murder before a justice of the peace, without a jury—it would not be an abuse of process to try another

habeas corpus application. The decision in the two circuits are of course not as drastic as the illustration. But a fair claim can be made that they are of such a nature as not to make a successive application captious. Both in the 2nd Circuit and in the 5th Circuit, the main presentation for the petitioner was the pressing upon the court of the decision of this court in the *Stever* case, 222 U. S. 167; the *Post* case, 161 U. S. 583; *Virginia* v. *Paul,* 148 U. S. 107. The slightest examination of them will show that, to put it mildly, they are sufficiently relevant to the contentions of appellant to be worthy of serious consideration. In both of said circuits, the decision mentions neither of these cases, nor deals with them or either of them in any way. Instead, both courts declared themselves controlled by the Circuit Court of Appeals decisions of *Moffatt,* 232 Fed. 532, and *Biggerstaff,* 260 Fed. 926. Neither of these so much as mentions or in any way deals with the *Stever* decision, the *Post* decision or the one in *Virginia* v. *Paul.* Neither cites any authority. One is a bald dictum. The other, based on a false premise. Objections to following these two circuit decisions were elaborately made. This avoidance is mentioned by neither court. Both refer to those decisions and to what they hold. The appellant never denied that they existed or what they ruled, but he rested wholly upon avoidances to their being recognized. As said, each of the courts simply declared that those decisions existed and that they would follow them, without any mention whatever of the avoidance.

In the opinion by the Court of Appeals for the 5th Circuit, it was presented that the lower court erred in ordering a removal after appeals to this court had been perfected. To escape the effect of that, the court created three warrants of removal where but one was ever

applied for or ever issued (41, 94, 342). By that method, it found a warrant of removal of which to say that it was not involved in the said perfected appeal, and thereupon sustained the lower court on this point.

The statement is:

"Three warrants for removal were granted the day before the appeals to the Supreme Court were allowed. Only two of these warrants were affected by those appeals. The third warrant remained unaffected, and there was nothing to prevent petitioner's removal except the subsequent allowance of an appeal by a member of this court. Our concern is, therefore, solely with the case on appeal here, in which the warrant of removal is based on a bench warrant due to a forfeiture of the bond given by the petitioner in the Southern District of New York for an appearance in the District of South Dakota."

There was but one warrant of removal, and that was the one based on the bench warrant on that forfeiture and this bench warrant was the basis of the complaint filed by Mr. Bryant in case No. 17238—one of the two in which appeal to this court was perfected, and the complaint in the Court of Appeals was that it was error to attempt the execution of removal after said appeal had been perfected. (342-48)

The warrant of removal was involved in the appeals to this court.

The *Greene* case, 52 Fed. 106, points out that in the *Terrell* case, 51 Fed. 213, Judge Lacombe properly states that the same right and duty of looking into the indictment arises upon *habeas corpus*, whether the petitioner is held under the warrant of removal, issued by the judge whose decision is thus reviewed, or under the warrant of a commissioner to await the action of the district judge. For this proposition the *Terrell* case cites numerous federal decisions.

To like effect is *In re Dana,* 68 Fed. at 891, 892, and *In re Corning,* 51 Fed. 205.

This does not appeal to one as evidencing the judicial consideration which might operate as evidence that the successive application was captious.

The Circuit Court of Appeals in the Second Circuit decided the *Olsen* case (287 Fed. at 85) on December 7, 1922. It decided the *Salinger* case (288 Fed. at 712), on March 13, 1923. The *Olsen* case declares that under the statute as now amended, the very gist of the offense was mailing in execution of the alleged scheme, and that this mailing alone gave the Federal Court jurisdiction. In the *Salinger* case, the court had before it an indictment returned in South Dakota which states on its face that the mailing was done in Iowa. The *Olsen* case is not mentioned, and removal was ordered in flat contradiction of what is ruled in the *Olsen* case, decided so recently before the *Salinger* case was, and by the same court.

The court speaks of the evidentiary offense of flight. (288 Fed. at 755, 756.) There was no evidence of flight before it. (67-75-342)

Rule Twenty-six in that court provides: "a petition for rehearing may be filed within fifteen days from the filing of the opinion of this court in the clerk's office. Rule Twenty-nine, that

"a mandate or other proper process in the nature of a procedendo may issue at any time on order of this court; but unless otherwise ordered, shall issue at the expiration of fifteen days from the filing of opinion of this court in the clerk's office unless delayed by the filing of a petition for rehearing."

Notwithstanding this, a mandate issued on the very day the opinion was filed, and thus all opportunity to apply for rehearing to obtain *certiorari* was denied in the teeth of the rules of the court. (288 Fed. at 712.) (89, 90)

All these things do not stamp the decision in the Second Circuit as being of such character as that a successive application may be held to be an abuse of process. *More*, 39 Ala. 63.

In the *Salinger* case, 288 Fed. at 755, it is pointed out, it is claimed, there should be no removal because the indictment was returned in the Western Division of South Dakota and the offending is charged to have been in the Southern Division. This point invoked Section 53 of the Judicial Code which requires that prosecution shall be had in the division wherein it is charged the offending had been done. In the *Post* case, 161 U. S. 583, it was held that a failure to observe such a requirement left the court without jurisdiction and made the indictment a nullity. The court mentions neither Section 53 nor the Post decision, but disposes of the point with the statement that it presents a mere formal matter—that "*the point is one of mere form.*"

We submit that the decision in the Second Circuit ought not to stamp an application for successive writs as being an abuse of process.

Decisions on former applications resulting in remand may, if their nature justifies it, be treated as precedents, but they do not constitute an adjudication. *Ex Parte Clark* (Mo.), 106 S. W. 995, 996; *Thaw*, 118 N. Y. S. 393; *Fanning*, 37 Ohio State, 344; *Meiss*, 44 Ohio State, 253, 258; *Carter*, 105 Fed. 614-15.

Opinions and decrees are evidence to show that they were rendered and entered; they are precedents, but not estoppels. Greenleaf, Ev. Sec. 511; Mack, 60 Fed. 753.

We have attempted to show that the decisions in the Second and in the Fifth Circuits should not be treated as precedents.

Part 4-1.

CONGRESS HAS ACQUIESCED IN THE FEDERAL PRACTICE.

In the case of *Kopel,* 148 Fed. 506, decided October 10, 1906, it was declared that as there was

"no Federal statute limiting the common law right of the applicant for *habeas corpus* to successively petition every judge having authority in the premises without regard to the fate of his successive application * * * I consider myself bound to dispose of the matter as an original application."

In the case of *Graves* (C. C. A.), 270 Fed. at 187, decided December 21, 1920, it was said:

"The alleged abuse of the right of appeal in *habeas corpus* proceedings has been under discussion at various times in the Federal courts and must long before now have come to the attention of Congress; but down to the present time that body has manifested no disposition to limit the right of appeal in such cases except where 'the detention complained of is by virtue of the process issued out of a State court,' in which case 'no appeal to the Supreme Court shall be allowed unless the United States Court by which the final decision was rendered or a justice of the Supreme Court shall be of opinion that there exists probable cause for an appeal.' " This was done by the Act of March 10, 1908. 35 Stat. c. 76.

"And until Congress takes such action the courts should enforce the statutes as they stand, without undertaking to limit them by judicial construction."

Not only this, but in the many state cases we cite, many base the holding that successive writs are permitted upon the express ground that no statute has prohibited such application. And as said in the *Graves* case, though Congress was thus informed, constantly,

that successive writs would be entertained unless it interfered by statute, it has not yet seen fit to enact one.

There are two sides to the abuse of process argument. It may fairly be said that if it were discretionary to deny a successive application on the ground that making it constituted an abuse of process, much more harm might be done than will ever be done by the occasional instances in which the process might be said to be abused by successive applications.

The same argument has been made against denying the Federal courts the discretion to allow an appeal from a remand in *habeas corpus*. On this point, it was said in the case of *Graves*, 270 Fed. 187:

"If in *habeas corpus* cases the right of appeal may be open to abuse, and discretionary authority vested in the Court called upon to allow the appeal might in some instances be beneficial, the same would be true of the right of appeal involving property rights. But in either class of cases it might on the other hand be said that if the right were discretionary with the Court the resultant harm might be greater than the benefit."

Speaking to the possibility of the abuse of the writ, it was said in the case of *Snell* (Minn.), 16 N. W. at 692:

It may be urged that to allow the issue of successive writs will be intolerable and oppressive to the courts and to the public law officers. To this there are several answers: *First*, Business of this kind is ordinarily controlled and conducted by an honorable profession. *Second*, Experience is to the contrary. We may rest with comfortable assurance upon the fact that, after many years' trial in this country and centuries of trial in England, the right to successive writs has not been found to work any serious practical inconvenience. See remarks of Allen, J., *Tweed's* Case, 60 N. Y. 567, at bottom. *Third*. if the inconvenience were great, the citizen's right to liberty is greater.

And it should not be overlooked that it is a quite general rule that where the court declines to issue the writ,

that, while appeal will lie, the petitioner remains in custody—which is some check upon possible abuse of the writ because such abuse will hardly be engaged in if no liberation results, because on successive applications the court may decline to issue the writ.

Division V.

No giving bond or any other matter of estoppel can bar resisting removal, if the demander has no jurisdiction. For such lack cannot be cured by express consent—much less by consent by implication.

Perhaps this branch of the argument should begin with something other than we are putting first. But it will conduce to clarity if we proceed somewhat in inverse order.

Assume that this indictment charges no offense against the laws of the United States and shows that South Dakota has no jurisdiction. If that be so, what difference does it make that appellant gave an appearance bond. Surely no removal is to be ordered if nothing can be accomplished after the removal has been executed. It is said in the *Tinsley* case, 205 U. S. 20, 27 Sup. Ct. at 433, that if the indictment is in such condition, there is no justification for ordering removal "and thus subjecting the defendant to the necessity of making such a defense in the court where the indictment was found." If the indictment is in such state, what difference does it make that said bond was given. When appellant reached the trial court the indictment must on his attack be held to be a nullity, and the fact that he had given said bond would not avoid that result. In fewer words, the giving of the bond would still make the removal an idle thing because despite removal there could be no conviction and not even

a trial. Would it not be just as idle to order removal with the indictment in that condition as it would be idle, had no bond been given. Why stress its giving when nothing can be accomplished though it was given. An indictment such as this fails to supply the essential thing on removal to wit, "some competent evidence to show that an offense has been committed over which the court in the other district has jurisdiction"—*Greene* v. *Henkel,* 183 U. S. 249, 22 Sup. Ct. at 223; *Tinsley's* case, 205 U. S. 20, 27 Sup. Ct. at 433—and there must be a discharge if there is no competent evidence.—*U. S.* v. *Kallas,* 272 Fed. 742. Does the fact that the appearance bond was given supply this competent evidence. Can it supply any essential thing if that thing does not exist.

Again—if there be no jurisdiction because no offense against the United States is charged over which the demander has jurisdiction, it has been held that a bond given to appear before the demander is a nullity. *Candler* v. *Kirksey* (Ga.) 84 American State Report 247; *Mason* v. *Terrell* (Ga.) 60 S. E. 4. How can it affect the right to resist removal that a so-called bond which is a piece of waste paper was given. There is no power in the demander to do *anything,* including the exacting of bonds. Interpreting the case of *Greene,* 183 U. S. 249, it is said in the *Tinsley's* case, 205 U. S. 20, 27 Sup. Ct. at 433, "if it appeared that the offense charged was not committed or triable in the district to which the removal was sought, the judge would not be justified in ordering the removal because there would be no jurisdiction to commit nor any to order the removal of the prisoner." We are justified in adding that there is not only a lack of power to do these described things, but no power to do anything, including the exacting of bonds. Speaking approvingly of a pronouncement by Judge Dillon, it is said in the case of *Corning,* 51 Fed. 206:

"A district judge who should order the removal of a prisoner when the only probable cause relied on or shown was an indictment, and that indictment failed to show an offense against the United States * * * must misconceive his duty and fails to protect the liberty of the citizen."

And in the case of *Stewart* (C. C. A.) 119 Fed. at 93, it is said that the judge misconceives his duty and fails to protect the liberty of the citizen if he issues the warrant solely on the strength of an indictment found in a foreign district which does not substantially state an offense under Federal laws."

WHEN THERE IS NO JURISDICTION, NOTHING CAN GIVE IT—NO ESTOPPEL CAN GIVE IT—AND COLLATERAL ATTACK ALWAYS AVAILS.

It is competent to attack a void judgment collaterally. *Morris,* 129 U. S. 325. Lack of jurisdiction is always open to the collateral attack involved in *habeas corpus. Miskimins* (Wyo.) 149 L. R. A. 836; *Farnam,* 3 Colo. 547, and cases cited.

Lack of jurisdiction may be raised at any time and in any manner. *Metcalf* v. *Watertown,* 128 U. S. 586; *In Re Columbia,* 101 Federal, at 970; *Ex Parte Gibson,* 31 Cal. 625. If a judgment be a nullity it may be attacked at any time by the party whose rights are sought to be affected by it. *Alexander* v. *Mortgage Co.* 47 Fed. at 134; *Morey* (Utah), 64 Pac. 764. In *U. S.* v. *Rogers,* 23 Federal, 658, a removal proceeding, it is said:

"Jurisdiction can be raised at any stage of a criminal proceeding. It is never presumed, but must always be proved; and it is never waived by a defendant."

No act on part of accused can waive lack of jurisdiction over the subject matter. *Rolett,* 6 Iowa, 534; *Morey* (Utah), 64 Pac. 764; 16 Corpus Juris 184—wherefore at-

tacks upon jurisdiction may prevail even after verdict. *Gilmer,* 129 U. S. 315, 9 Sup. Ct. at 292, 293.

The opinion of the Circuit Court of Appeals for the Fifth Circuit stresses the fact that appellant gave an appearance bond while in New York, to appear for trial in South Dakota, and that he did not appear. It is hard to tell whether this is addressed to the claim that he is barred from resisting removal because he has abused process or because the giving of such bond constitutes a waiver of his right to resist removal. We have already dealt with the first. As to the second, to say the least, the giving of a bond could not be a waiver unless it was given voluntarily. We have already called attention to the fact that on reason and on the authority of the *Stallings* case the bond was not given voluntarily, but was given because the only other option was to suffer physical removal instantly.

Passing that—such questions of estoppel by adjudication or by abuse of process or by the giving of bond have no place in these appeals. If the District Court of the U. S. for South Dakota has jurisdiction and the indictment is a valid one, defendant must submit to removal even if he had never made an application which could be treated as a former adjudication, if he had never abused process and had never given a bond. If, on the other hand, that court has no jurisdiction and the indictment made the basis for removal is a nullity, it does not matter what the petitioner has done—this, for the simple reason that nothing he can do can waive the lack of jurisdiction or confer jurisdiction where it does not exist.—*Rogers,* 23 Fed. 658. If the demander has no jurisdiction, the bond is waste paper.

The bond is void where nothing could be done in the trial court in which the bond agrees to make appearance.

Kingsbury's case, 1 Conn. *page 407.

It is void where taken in a proceeding under an information made in one state which is not the state where the crime was perpetrated.

State v. *Hufford*, 28 Ia. 391.

Is ineffective where there is a failure to charge crime, in that substantial elements are omitted in the indictment.

Mason (Ga.) 60 S. E. 4.
Marks (Ga.) 60 S. E. 1016.
Rogers, (Ga.) 75 S. E. 1131.

Where the indictment fails to charge an offense it is the same as if there were no indictment and the bond is void.

Candler (Ga.) 38 S. E. 825.
State v. *Woodley*, 25 Ga. 235.
McDaniel, 78 Ga. 188.
Mason (Ga.) 60 S. E. 4.

The bond is void if taken before information or indictment.

Baker (Tex.) 111 S. W. 735.
Ochoa (Tex.) 102 S. W. 415.
Leal (Tex.) 102 S. W. 414.

A bond is ineffective where either physically or in the eyes of the law there is an absence of indictment.

Brown (Tex.) 3 S. W. 478.
Wells (Tex.) 2 S. W. 806.
Brown (Tex.) 6 S. W. at 190.

Where in the eye of the law the indictment is void, it is as nonexistent as if it had never been physically created.

Brown (Tex.) 3 S. W. 478.
Wells (Tex.) 2 S. W. 806.
Brown (Tex.) 6 S. W. at 190.
State v. *Hufford*, 28 Iowa, 391.

"If, then, the indictment in this case is fatally defective, not only in not charging the defendant with the particular offense for which he was recognized to appear, but with none other, then the party stands unindicted to this time, and there has necessarily been no breach of his bond. This decision was cited and approved in *State* v. *Woodley*, 25 Ga. 235, and in *McDaniel* v. *Campbell*, 78 Ga. 188. We think as held in these cases, that an indictment which charges the principal in the recognizance with no offense against the state amounts to no indictment and that the sureties may set up its invalidity in defense to a *scire facias* to forfeit the recognizance.

Chandler v. *Kirksey*, 113 Ga. 309, 84 Amer. St. Rep. 247.

"That the indictment is a nullity is a good defense to a proceeding to forfeit a criminal bond requiring the presence of the defendant to answer such indictment. Consequently it was error to direct a verdict in favor of the plaintiff in *scire facias*, where it appeared that the obligation was based upon an indictment fatally defective. The case is not altered by reason of the fact that the recognizance was entered into after indictment, instead of prior to the action of the grand jury."

Mason v. *Terrell* (Ga.) 60 S. E. 4.

It follows that the giving of the bond is no bar to resisting removal. If the demanding district and court have no jurisdiction no power existed to demand the bond, nor for the government to become a party to it. If that be so, the bond is one-sided and it is not an "agreement" to appear, because one party of two cannot alone make what is an agreement. If there was no power to exact the bond, the case stands as though its exaction were prohibited by law, and an instrument thus prohibited can effect nothing. It stands as if the appellant had never signed it. A court without jurisdiction does not have the power to obtain an "agreement" that someone shall appear in and answer to it. To make the

bond anything but a piece of waste paper there must be power to take bond.

Schneider (Ky.) 3 Metc. 409.
Matthews (Ala.) 9 So. 740.
Hendricks, 7 Ky. 328.
Rogers, 14 Mich. 392.
Townsend, 14 Mich. 388.

Nothing done by a court that has no jurisdiction can give power to do anything; all its acts are nullities. *Newcomb's case*, 27 Iowa, at 288, citing Judge Marcy; *People* v. *Liscomb*, 60 N. Y. *571.

The most that the giving of the bond or the other claimed estoppels can possibly amount to is that, by implication, they consent to submitting to the indictment and to the court in which it was returned. It is horn book law that a want of jurisdiction cannot be cured by the most express and explicit of consents. And of course what cannot be done expressly cannot be done impliedly. To say this is but to repeat what has been said a thousand times—that consent cannot confer jurisdiction.

In *U. S.* v. *Conners*, 111 Fed. 734, it was ruled:

"There can be no order of removal upon consent of the party whose removal is sought, where the facts charged in the indictment do not constitute a crime."

It would not matter if appellant had signed a stipulation that he would appear and submit to trial. It would not matter if he went through trial and past conviction and sentence, without urging that the indictment was a nullity, and that there was no power to proceed against him under it.

In *State* v. *Rollett*, 6 Iowa, 534, the defendant not only raised no question as to the jurisdiction of the court during his trial, but pleaded guilty and paid the fine and costs imposed against him. Thereupon, he appealed, and

the defendant urging that the court had no jurisdiction, the court said:

"We think the defendant was not estopped from assigning errors upon the judgment and proceedings of the District Court, by the fact that he had discharged the fine and costs, imposed upon him by the judgment of the court, before taking his appeal."

In *State* v. *Morey,* Utah, 1901, 64 Pac. 764, defendant seems to have been tried under an unconstitutional act. He raised the want of juirsdiction for the first time on appeal—and the court said:

"Nor can the fact that the question of jurisdiction, resulting from the failure to file the information as provided by law, was made for the first time in this court, avail the state. In a case like the one at bar the prisoner has a constitutional right to have his case tried by a court having jurisdiction. His mere silence or failure during the trial to object to the jurisdiction assumed by the court did not constitute a waiver of that right, or prevent him, under such circumstances as are shown, herein, from raising the question at any subsequent stage of the proceedings, or after the trial."

It is said in 16 Corpus Juris, 184:

"The objection that the court is not a legal court, or that it has not jurisdiction of the offenses, cannot be waived, and may, therefore, be taken at any time."

Jurisdictional attacks are available even after verdict. *Gilmer,* 129 U. S. 315, 9 Sup. Ct. Rep. at 292, 293.

This is in the title "Criminal Law," (16 Corpus Juris) and at the end of Section 257, beginning on the same page:

"The objection that the court has no jurisdiction of the subject matter is not waived by plea, or by going to trial, and may be raised on motion in arrest of judgment, on appeal, or by a writ of *habeas corpus.*"

In a word, express consent and acquiescence and silence all through the trial would not give South Dakota jurisdiction if it lacks it.

It does not cure lack of jurisdiction that demurrer be interposed.

Post, 16 Sup. Ct. 12; 161 U. S. 583.

Nor that demurrer is interposed and then answer made.

Orcutt, 71 Iowa, 514.

Nor answering, demurring or by plea to the merits.

Southern Pacific Co. v. *Denton*, 146 U. S. 202, 13 Sup. Ct. at 46;

Railway v. *Pinkney*, 13 S. C. at 860.

Rogers, 23 Fed. 658.

Jurisdiction is not conferred by awaiting ruling on a plea of former adjudication to be decided.

Morris, 9 Sup. Ct. 289, 129 U. S. 315.

It is not conferred by pleading.

Cox, 88 Fed. 346.

Chappell, 155 U. S. 192.

It is not given where there is an overruled demurrer.

Ex Parte Nielsen, 9 Sup. Ct. 672, 131 U. S. 176.

It would seem to follow, inevitably, that nothing appellant may have done, including the giving of the bond, has the slightest tendency to bar him from resisting removal on the ground that the demanding court and district have no jurisdiction over the subject matter, and that the indictment which is made the basis of removal proceedings is therefore a nullity.

Division VI.

The matters presented here are each and all reviewable by habeas corpus.

Some of the decisions which we have invoked and in which it is held that such an indictment as the one at bar is a nullity for lack of jurisdiction were not removal case decisions. But that is adventitious. It does not matter under what circumstances a decision declaring a lack of jurisdiction is made. Whenever it is decided that there is no jurisdiction it is also decided that collateral attack lies; and, of course, *habeas corpus* is such an attack. This is not changed by the fact that lack of jurisdiction may also be availed of on direct attack. In the *Stever* and the *Chenault* cases an indictment such as the one at bar was successfully attacked but, respectively, by writ of error and motion for new trial.

There is every reason to believe that the District Court of the United States for the Eastern District of Louisiana held against petitioner on the ground that *habeas corpus* was not the permitted method of review. We say this because on motion for new trial that court in the case of *Chennault* held squarely that it must discharge because the indictment had been returned in a division wherein no offending was charged to have taken place.

The decision should, however, have been the same had it been made in response to collateral attack. In other words, a want of jurisdiction may be availed of either by direct or by collateral attack. When there is no jurisdiction then, in the eyes of the law, there is no court and no judicial action—and in such case there is no rule providing that a nullity can be attacked in one way only.

In Iowa (Section 3561, Code 1897) there is a statute making want of jurisdiction a ground for demurrer, but

the reports of that state have numerous cases wherein want of jurisdiction was successfully urged in collateral attack. See for one, the case of *Orcutt,* 71 Iowa 514.

It is the settled law that want of jurisdiction can be successfully attacked by *habeas corpus* even if it might also have been done by direct attack.

If the court has exceeded its jurisdiction there will be discharge on *habeas corpus*, though relief might have been had by petition in error.

Ex Parte Miskimins, 49 L. R. A. 836, ... Wyo. .....

In re Boulter, 40 Pac. 520, ... Wyo. .....

It is no argument that the party might have appealed within a limited time and had neglected to do so and is, therefore, without remedy, and must continue in confinement.

Yates v. *People,* 6 Johns (N. Y.) 164.

Though the party may appeal he may also attack by *habeas corpus.*

Rogers, 23 Fed. 658.

We concede freely there are many things that cannot be reviewed by *habeas corpus.* But we are not concerned with those. The controlling question here is what *can* be reviewed by *habeas corpus.* Our contention is that no matter what may not be thus reviewed, what we are presenting is under well settled law so reviewable.

Referring to *In re Buell,* 3 Dill. 120, 121; *In re Terrell,* 51 Fed. 213; *In re Dana,* 68 Fed. 886; *In re James,* 18 Fed. 853, and *U. S.* v. *Brawner,* 7 Fed. 86—it is said in *Stewart* v. *U. S.* (C. C. A.) 119 Fed. at 93:

"The practice of issuing a writ of *habeas corpus* in such cases for the purpose of inquiring into the validity of an indictment on the strength of which a person has

been commtited to await the issuance of a warrant of removal under Section 1014, R. S. was also sanctioned and approved by the Supreme Court of the United States, in the case of *In re Palliser,* 136 U. S. 257, 10 Sup. Ct. 1034, and *Horner* v. *U. S.* 143 U. S. 207, 12 Sup. Ct. 407."

In *Benson* v. *Henkel,* 198 U. S. 1, 25 Sup. Ct. 569; *Beavers* v. *Henkel,* 24 Sup. Ct. 606, 194 U. S. 73; *Greene* v. *Henkel,* 183 U. S. 249, 22 Sup. Ct. 218, and in *Tinsley's* case, 205 U. S. 20, 27 Sup. Ct. 430 (in which there was a reversal for refusal to discharge), the Supreme Court reviewed appeals from dismissals and remand on *habeas corpus.*

Appeal involving venue, and from refusal to discharge on *habeas corpus,* was entertained in *Brown* v. *Elliott,* 225 U. S. 392, 32 Sup. Ct. 812. In the *Tillinghast* case, 225 Fed. at top 228, and 234, there was review and reversal on the authority of the above named cases decided by the Supreme Court of the United States.

Questions like the ones at bar were reviewed on *habeas corpus* in the cases of *In re Greene,* 52 Fed. 104; *In re Price,* 83 Fed. 830, and *In re Price,* 89 Fed. 84.

Undoubtedly, one reason for this practice is that *habeas corpus* lies where there is a detention in violation of the Constitution or of the laws of the United States.

Where the indictment is returned in a district in which no offense was committed, removal under it would be a violation of the Sixth Amendment to the Constitution. *Pereless,* 157 Fed. 419; *Beshears,* 79 Fed. 73; *In re Greene,* 53 Fed. at 106, 107; *Fries,* 284 Fed. at 827; *Benson,* 17 L. R. S. (N. S.) at 1250. This constitutional provision fixes venue, *Tillinghast,* 225 Fed. 232; *Ex Parte Lair,* 177 Fed. 790. The *Tillinghast* case, 225 Fed. at 232, a removal case, quotes from and applies the *Burr* decision, that certain flaws in the indictment invoke a question of constitutional right (232)—and say, that if

such an indictment is to be sustained "then the *prima facie* effect of an indictment as evidence of probable cause is entirely destroyed." (230, 231.)

And violations of constitutional guaranties are reviewable in *habeas corpus*. *Ex Parte Nielsen,* 131 U. S. 176, 9 Sup. Ct. Rep. 675, because disobedience of the Constitution and denying rights given by it work lack of jurisdiction, even where the court, in a general sense, has jurisdiction. Brown Juris. approved in *Miskimins* (Wyo.), 49 L. R. A. 836.

Review by *habeas corpus* lies where instead of a violation of the Constitution there is a violation of the laws of the United States. *Cunningham,* 135 U. S. 1, 10 Sup. Ct. Rep. 658, 660; *Siebold,* 110 U. S. 374, 376, 377; *Ex Parte Virginia,* 100 U. S. 343; *Ex Parte Lange,* 18 Wall. 163; *Beavers,* 194 U. S. 85, 24 Sup. Ct. at 606, 607; *Miskimins* (Wyo.), 49 L. R. A. 831, 836. This has been applied to the law dealing with where the grand jury must act. *Beavers,* 194 U. S., top 85. And to the law dealing with division venue; *Chenault,* 230 Federal 942; *Christopherson,* 261 Fed. 226.

Speaking of *Greene* v. *Henkel,* 183 U. S. 249, 22 Sup. Ct. 218, it is said in *Tinsley* v. *Treat,* 205 U. S. 20, 27 Sup. Ct. at 432, 433:

"Mr. Justice Peckham, in delivering the opinion, was careful to say that it was not held that where the indictment charged no offense against the United States or the evidence failed to show any, or, if it appeared that the offense charged was not committed or triable in the district to which the removal was sought, the judge would be justified in ordering the removal, because there would be no jurisdiction to commit or any to order the removal of the prisoner. 'There must be some competent evidence to show that an offense has been committed over which the court in the other district had jurisdiction, and that the defendant is the individual

named in the charge, and that there is probable cause for believing him guilty of the offense charged."

In the case of *Henry* v. *Henkel,* 235 U. S. 219, 35 Sup. Ct. 54, it is said:

"The cases cited do not, of course, lead to the conclusion that a citizen can be held in custody or removed for trial where there was no provision of the common law or warrant making an offense of the acts charged. In such case, the committing court would have no jurisdiction, the prisoner would be in custody without warrant of law, and, therefore, entitled to this discharge," citing *Greene* 183 U. S. 261, 22 Sup. Ct. 218.

On an application for removal of a prisoner, under Rev. St. No. 1014, where the only ground for the warrant is an indictment pending in the District Court of the district to which the removal is sought, and it appears from said indictment that the court has not jurisdiction of the alleged offense, the defendant should be discharged. That is the necessary implication from the statute.

Lee, 84 Fed. 626; *Pope,* 27 Fed. cases, 593; *Greene,* 52 Fed. 104 and 615; *Wolf,* 27 Fed. 606; *Dana,* 68 Fed. 886; *James,* 18 Fed. 853; *Doig,* 4 Fed. 193; *Buell,* 4 Fed. case 587; *Rogers,* 23 Fed. 658; *Terrell,* 51 Fed. 213; *Branner,* 7 Fed. 86.

In *U. S.* v. *Lynn,* 284 Fed. 907, it is settled that if the demanding court is without jurisdiction the indictment is a nullity as evidence, and it is at least implied that if that be its state this may go to the jurisdiction of the commissioner to act, *affirmatively.*

These rules have been applied to a case where the lower court disregarded a plea, and so made a second conviction for the same offense possible. *Ex Parte Nielsen,* 124 U. S. 309, 9 Sup. Ct. 672, 674. And this court added:

"And why should not such a rule prevail *in favorem libertatis.* If we have seemed to hold the contrary in any case, it has been done from inadvertence."

In the case of *Greene,* 52 Fed. 106, many cases are cited for the proposition that in removal proceedings under Section 1014 the court makes judicial inquiry on whether the indictment charges an offense and whether the court in which indictment was returned had jurisdiction. It declares that such investigation is the uniform practice of the federal court.

If the Supreme Court should rule on appeal from a refusal to discharge that the indictment is void, it would so hold on appeal from a conviction. Can it be possible it would send the petitioner to the trial court there to object to the indicctment, merely to the end that if overruled and convicted, it may, on appeal from that, say for the first time that the indictment is void.

Where the error is apparent and the imprisonment unjustified, the Appellate Court may perhaps in discretion give immediate relief on *habeas corpus,* thus saving the party the delay and expense of a writ of error.

Ex Parte Siebold, 100 U. S. 375.

Respectfully submitted,

B. I. Salinger,
Attorney for Appellant.

SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Sec. 3, Article 3, Constitution of the United States.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

Section 53, Judicial Code.

When a district contains more than one division, every suit not of a local nature against a single defendant must be brought in the division where he resides; but if there are two or more defendants residing in different divisions of the district it may be brought in either division. All means and final process subject to the provisions of this section may be served and executed in any or all of the divisions of the district, or if the state contains more than one district, then in any of such districts, as provided in the preceding section. All *prosecutions* for crimes or offenses *shall be had within the division of such districts where the same were committed,* unless the court, or the judge thereof, *upon the application of the defendant,* shall order the cause to be transferred for prosecution to another division of the district. When a transfer is ordered by the court or judge, all the papers in the case, or certified copies thereof, shall be transmitted by the clerk, under the seal of the court, to the division to which the cause is so ordered transferred; and thereupon the cause shall be proceeded within said division in the same manner as if the offense had been committed therein. In all cases of the removal of suits from the courts of a state to the District Court of the United States such removal shall

be to the United States District Court in the division in which the county is situated from which the removal is made; and the time within which the removal by the terms of United States courts, shall be deemed to refer to the terms of the United States District Court in such division. (36 Stat. L. 1101.)

Sec. 215 Crim. Code, page 12796.

Using the mails to promote frauds; counterfeit money punishment for.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, bank note, paper money, or any obligation or security of the United States, or of any state, territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "saw-dust swindle," or "counterfeit-money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "green goods," "bills," "paper goods," "spurious treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than one thou-

sand dollars, or imprisoned not more than five years, or both. R. S. Sec. 5480, as amended Act March 2, 1889, C. 303, Sec. 1, 25 Stat. 873. Act March 4, 1909, C. 321, Sec. 215, 35 Stat. 1130.

Sec. 1674, Compiled Statutes, 1916. (R. S. Sec. 1014.) Offenders against the United States, how arrested and removed for trial.

For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense.

Sec. 1682. (R. S. Sec. 1018.) Surrender of criminals by their bail.

Any party charged with a criminal offense and admitted to bail, may, in vacation, be arrested by his bail, and delivered to the marshal or his deputy, before any judge or other officer having power to commit for such offense; and at the request of such bail, the judge or other officer shall recommit the party so arrested to the custody of the marshal, and indorse on the recognizance, or certified copy thereof, the discharge and exoneratur of such bail; and the party so committed shall therefrom be held in custody until discharged by due course of law.

Sec. 1683. (R. S. Sec. 1019.) New bail to be given in certain cases.

When proof is made to any judge of the United States, or other magistrate having authority to commit on criminal charges as aforesaid, that a person previously admitted to bail on any such charge is about to abscond, and that his bail is insufficient the judge or magistrate shall require such person to give better security, or, for default thereof, cause him to be committed to prison; and an order for his arrest may be indorsed on the former commitment, or a new warrant therefor may be issued, by such judge or magistrate, setting forth the cause thereof.